No. 292

In the Supreme Court of the United States

OCTOBER TERM, 1948

GEORGE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority and dissenting opinions (R. 1038–1050) in the Court of Appeals are reported at 169 F. 2d 856.

JURISDICTION

The judgment of the Court of Appeals was entered August 23, 1948 (R. 1050). The petition for a writ of certiorari was filed September 22, 1948, and was granted December 6, 1948 (R. 1051). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether that part of petitioner's testimony before an OPA official which substantially concerned the offenses of which he stands convicted was voluntarily given in waiver of immunity from prosecution for those offenses.

2. Whether petitioner acquired immunity on the basis of testimony which was not self-incriminating but was falsely exculpatory.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, * * *.

Section 202 of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 50 U. S. C. App. 922, provided:

> (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.
>
> (b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who

rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

* * * * *

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

The Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U. S. C. 46, provides:

That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any Amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and

documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

STATEMENT

On March 31, 1947, two informations of 41 counts each were filed against petitioner and Daisart Sportswear, Inc., and one Deeb charging them with the misuse of priorities established under section 301 of the Second War Powers Act (56 Stat. 177; 58 Stat. 827; 60 Stat. 868; 50 U. S. C. App. 633) by unlawfully applying and extending preference ratings on the purchase of specified quantities of cotton and rayon textiles and by illegally diverting those materials to other than certified uses (R. 15–20). On September 23, 1947, petitioner, the corporation and Deeb were indicted for conspiracy to violate the Emergency Price Control Act of 1942 (50 U. S. C. App. 901 et seq.) and the regulations promulgated thereunder by selling finished piece goods at prices in excess of the established OPA ceilings, by issuing false invoices, and by failing to keep accurate records (R. 21–26). The two informations and the indictment were consolidated for trial (R. 28–32).

The evidence in support of these charges may be summarized as follows:

In 1944 and 1945, Daisart Sportswear, Inc., which was wholly owned and controlled by petitioner (R. 1014), had an arrangement with Metals Disintegrating Corporation whereby it supplied Metals with bags for use in filtering and packing ammunition in connection with the latter's performance of Army and Navy contracts (R. 39–45, 51, 57–58, 111.) Metals, as it was authorized to do under its Government contracts, furnished Daisart with high blanket preference ratings to enable the latter to obtain materials to be made into the ammunition bags, with the understanding that Daisart would apply and extend the ratings to suppliers of the materials (R. 52, 55–56, 385, 397–398). During this period, Daisart sold Metals 11,987 bags which comprised about 48,920 yards of material and for which Metals paid Daisart $7,959.71 (R. 721–722). In contrast with the relatively small amount of material utilized for the permitted purpose, which was the only one for which Daisart had any right to extend priorities (R. 385–397), petitioner issued to suppliers rated orders (in which he certified that Daisart had the right to use high priorities) for 4,157,275 yards of textiles, 3,086,500 yards of which were actually invoiced to and paid for by Daisart (R. 733). As to 3,732,000 yards of the textiles so ordered, petitioner certified specifically that the end use contemplated was the making of ammunition

bags. Of this latter amount, 2,642,697 yards of material, or approximately 54 times the amount actually used for that purpose, were invoiced to and paid for by Daisart (R. 734). Only 192 ammunition bags, less than two percent of the total, were purchased by Metals from Daisart after December 1944 (R. 721–722), whereas Daisart ordered more than 3,000,000 yards of textiles after that date (see R. 932).

The material of which these ammunition bags were made was a grayish-white canvas or duck, similar to the material used for tents (R. 115–116), whereas the materials which were obtained by Daisart through the use of the high priority ratings consisted of a variety of colors and finishes, including nainsook, rayons, combed cotton, twill, etc. (R. 239, 266, 309–310, 324). Much of the materials so obtained was resold by petitioner in the original crates, often within days of their receipt from the suppliers and sometimes even in anticipation of their delivery (R. 511). As contrasted with the $7,959 worth of bags sold to Metals (R. 722), petitioner's dealings with other purchasers of the materials involved charges of $1,194,694.63 (R. 723).

The materials were diverted to various civilian handkerchief, dress, negligee and raincoat manufacturers at prices in excess of established OPA ceilings (e. g. R. 82, 229, 418, 432–433, 459, 743–744). The moneys in payment of these goods

found their way through various devices into petitioner's or Daisart's bank accounts (R. 207, 227, 437, 505). In these dealings, petitioner and the corporation failed to keep records (R. 384, 393), sold goods without invoices (R. 193), engaged in transactions under fictitious names (R. 612, 630–631, 668), and invoiced goods at fictitious prices (R. 215, 425, 459, 500) and under false descriptions (R. 471).

Two investigators of the War Production Board visited Daisart's premises in August 1945,[1] to examine the books of account of the corporation (R. 381, 391). Petitioner and his accountant represented to them that the only records available were a check book, cancelled check vouchers, some creditors' invoices, and sales records covering the period from January 1, 1944, to August 24, 1945, with the exception of a four-months' period in 1944 (R. 393, 396, 399). These records were shown to the investigators and petitioner admitted to them that he was connected with the corporation and that it did contract work for various firms and for the Government (R. 383). He stated that work was done on the basis of priorities and he gave the investigators the numbers of the priorities he was using (R. 383). One of the investigators testified as follows (R. 397–398):

> Q. Now, did you have some talk about priorities?

[1] The last application of priority ratings charged in the information occurred on July 18, 1945 (R. 17, 20).

A. Yes.

Q. With whom did you have it and what was said?

A. With Mr. Smith and I asked whether what priority he had, and he told me that the purchase of the goods was predicated upon a blanket order which Daisart received from the Metals Disintegrating Company to purchase all the piece-goods needed to manufacture powder filter bags. Mr. Smith also stated that he was advised by Metals Disintegrating Company that they were unable to obtain the necessary material for the powder bags and therefore had given Daisart the blanket order as mentioned heretofore.

Some of the creditors' invoices which the investigators examined bore the imprint of a stamp containing the priority number Daisart had used in ordering the particular goods. The invoices and the cancelled checks of Daisart, moreover, disclosed the names of the suppliers of the textiles. (R. 384–385, 394.) The check book and the cancelled checks showed that Daisart had accounts in two banks, including the Fidelity Union Trust Company, Newark, New Jersey (R. 394, 412). Cancelled checks in the amount of $281,000, which were shown to the investigators by petitioner, represented payments for part of the materials purchased by Daisart in 1945 (R. 397). Petitioner denied to the investigators that any goods were sold (R. 386) and stated that all

the material represented by the checks, except that still on hand, had been processed into manufactured items (R. 397).

On April 30, 1946, petitioner testified before an OPA official under circumstances which are undisputed (R. 1009, 1030). Petitioner had appeared with counsel in response to two subpoenas which had been served upon him—one in his individual capacity and the other as an officer of Daisart. The subpoenas called for the production of all books, records, and documents of petitioner and the corporation pertaining to the purchase, manufacture, and sale of materials and fabrics from January 1, 1945, to the day of the examination (see R. 1012, 1013). After petitioner was sworn, the OPA examiner advised him that in accordance with constitutional guarantees he could not be compelled to make any self-incriminating statements (R. 1010). After answering a few preliminary questions, petitioner asserted a claim of "privilege as to anything that I say" (R. 1011). He explained his failure to produce any of the records called for by the subpoenas on the ground that they had been either destroyed, lost, or misplaced (R. 1012–1013). He testified that he was the sole stockholder, officer, and director of Daisart Sportswear, Inc., which, prior to October 1945, had been engaged in the manufacture, purchase, and sale of textiles and allied products (R. 1015).

orities in a blanket sum and Daisart used the priorities to procure materials so as to maintain a constant stock to fill orders from Metals. If the materials on hand were excessive for that purpose they were sold (R. 1026–1027).

(b) Daisart computed its selling prices for such surpluses at cost plus freight and less discounts (R. 1019).

(c) Petitioner was the sole stockholder, officer and director of Daisart, which was engaged in the business of manufacturing, purchasing and selling textiles and kindred products (R. 1014–1015).

(d) Daisart was a contractor for many manufacturers of wearing apparel (R. 1018).

(e) In addition to the three named suppliers from whom petitioner purchased materials (for which he obtained immunity covering 12 counts of each of the informations) there were "several others but I cannot remember them" (R. 1021).

(f) Petitioner paid for materials by checks drawn on an account at the Fidelity Union Trust Company, Newark, New Jersey (R. 1021).

"When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." Holmes, J., in *Heike* v. *United States*, 227 U. S. 131, 144. Cf. *Cumarota* v. *United States*, 111 F. 2d 243 (C. A. 3), certiorari denied, 311 U. S. 651; 8 Wigmore, *Evidence* (3d ed. 1940) § 2261, p. 358.

He also testified that as part of its operations, Daisart made wearing apparel as a contractor for several manufacturers, specifically naming five of them, and made ammunition bags as a subcontractor for Metals Disintegrating Company, which had a prime contract with the United States Government (R. 1018). He denied that Daisart had ever purchased materials for the sole purpose of reselling them and stated that Daisart had sold only those materials which were surplus resulting from its operations in making clothing and ammunition bags (R. 1017–1018). Petitioner stated that these sales took place "from about April or May of 1945" (R. 1021). In response to a question concerning the company's method of computing the prices of materials which it sold, petitioner testified that "Since it was surplus, it was sold at the price billed to me plus freight and haulage and less discount allowed to me" (R. 1019). He gave the names of three of the concerns from which Daisart had purchased materials in connection with its manufacturing operations and said there were several others which he could not remember (R. 1021). He testified also that Daisart had received invoices from the suppliers. He further stated that the corporation had an account at the Fidelity Union and Trust Company, Newark, New Jersey, and that payment for purchases of materials were always made by check (R. 1021).

In construing the correlative privilege against self-incrimination which, as we have seen, measures the claim of immunity, Taft, J., stated in *Ex parte Irvine,* 74 Fed. 954, 960:

> * * * It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime. * * *

Petitioner's testimony summarized in paragraphs (c), (d), (e) and (f) did not relate in any substantial way to the offenses involved here. It is frivolous to contend that petitioner's testimony that he was the sole stockholder, officer and director of the Daisart corporation, tended to incriminate him in any way. That was a matter of public notoriety which, we suppose, was revealed repeatedly in records which were filed with governmental authorities. See Revised Statutes of New Jersey, 1937, 14; 5–1, 14; 6–2. It was as innocuous as the disclosure of his name and residence, which he concedes was no [redacted] vasion

Petitioner stated that it was customary for the manufacturers to supply the material upon which the work was performed by Daisart; that if surplus or waste resulted, it was tacitly understood that Daisart could sell it for its own account; and that in the manufacture of ammunition bags, the waste was an amount almost equal to the material actually used in the bags (R. 1024–1026). Petitioner stated further that the manufacturers did not charge Daisart for material but merely shipped it for use in connection with their respective contracts and Daisart billed the manufacturers for finished garments, on which it had supplied the labor and trimmings. The following colloquy then occurred (R. 1026–1027):

> Q. [By OPA official]: So that with respect to Daisart Sportswear Inc., contracting activities on ammunition bag materials [*sic*] were shipped by the manufacturer without bill?
>
> A. It was not. Metals Disintegrating Company being a foreign concern and being unable to furnish this material, they asked me to purchase materials for them. They were aware that I cannot do that without proper priorities. Those priorities were forthcoming in a blanket sum. No stipulated amount and I was further told to maintain a constant stock for any orders they may call. I mean Daisart Sportswear Inc., for any orders they may call for. Their orders came to me sometimes dated and never in any set size or specified form.

of his privilege against self-incrimination (Br. 17). The nature of the business in which the corporation was engaged stood on the same footing. It is a common, perhaps almost universal practice, for corporate charters to contain a statement of the business which is conducted. Moreover, there were undoubtedly thousands of corporations which were engaged in "the manufacture, purchase, sales of textiles and allied products" (R. 1015). How such a disclosure could have had any substantial relationship to any criminal offense is not apparent. Similarly, testimony concerning manufacturers who *owned* the material on which Daisart merely performed services and supplied trimmings, thereby producing finished garments which were re-shipped to the manufacturers, bore no relationship to the charges that petitioner illegally and unlawfully applied and extended priorities in order to *purchase* materials which he then diverted to the black market.

The disclosure of the names of three of the concerns from which petitioner purchased materials was, however, more closely related to the transactions underlying 12 of the counts of each information. The Court of Appeals determined that these disclosures were sufficiently substantial to warrant reversal of his conviction on those counts. Petitioner is entitled to no more.

He insists, however, that he disclosed another substantial clue, to wit, that there were several

They charged [*sic*] from day to day. I then went about purchasing material for their work. When and if I had a surplus, I would notify them and ask them if they had anything immediately on hand as I am overstocked, at which time they told me they had not and to dispose of it.

Q. This is a voluntary statement. You do not claim immunity with respect to that statement?

A. No.

Q. I assume that anything you tell us, Mr. Smith, is subject to verification? You state that after a time Metals Disintegrating Company, although it had a contract with the government, was not in a position to furnish you with the materials necessary for Daisart to manufacture this item?

A. Right.

Q. And that because of that situation, Daisart was required to obtain priorities so that Daisart could obtain the materials and that it did so?

A. In a blanket amount.

Q. And that pursuant to that priority, Daisart thereafter acquired materials, some of which were used in the manufacture of ammunition bags for Metals, and some of it was disposed of by Daisart, is that correct?

A. Yes.

Q. And those disposals by Daisart formed a good part of the sales of fabrics made by Daisart?

A. They did.

When a transcript of this testimony before the OPA official, Government Exhibit 147A (R. 1009–1030), was offered in evidence, petitioner moved for dismissal of the informations and the indictment on the ground that he had acquired immunity from prosecution by virtue of his testimony (R. 653–654). The trial judge reserved decision on this motion and admitted Exhibit 147A in evidence as against petitioner and the corporation (R. 655–656). He subsequently ruled that it was admissible only as against the corporation and so instructed the jury (R. 850, 857, 983). He held, however, that petitioner had not acquired immunity on account of his disclosures and denied the motions to dismiss the informations and indictment and to direct a judgment of acquittal (R. 850–853). Neither petitioner nor Deeb, his individual co-defendant, took the stand.

Petitioner and the corporation were each found guilty on 35 counts of each of the two informations.[2] These counts charged illegal application and extension of preference ratings and illegal diversions of more than 4,000,000 yards of cotton and rayon textiles. They were also found guilty

[2] Deeb, who actively participated in several of the transactions as salesman or broker for Daisart, was convicted on five counts of each of the two informations and on the indictment, and was fined $20,000 and sentenced to imprisonment for a year and a day. His conviction was affirmed by the Court of Appeals and his petition for a writ of certiorari was denied by this Court on December 6, 1948 (No. 294).

on the conspiracy indictment (R. 988–990). Fines totalling $710,000 each were imposed upon petitioner and the corporation and he was sentenced to a total of three years' imprisonment (R. 4, 8–9, 13, 1002–1003).

The Court of Appeals affirmed the convictions, except as to 12 counts of each of the two informations on which petitioner's conviction was reversed on the ground that he had acquired immunity from prosecution for those offenses which specifically related to transactions between Daisart and the three firms whose names he had divulged in his testimony before the OPA official (R. 1047, 1050). The reversal as to the counts decreased the total amount of petitioner's fines by $240,000. One judge dissented in part on the ground that petitioner had also acquired immunity from prosecution for the conspiracy charged in the indictment (R. 1038–1050).

SUMMARY OF ARGUMENT

The immunity provision of Section 202 (g) of the Emergency Price Control Act is co-extensive with the constitutional provision against self-incrimination. *Shapiro* v. *United States*, 335 U. S. 1. The general claim of "privilege as to anything that I say," which petitioner interposed soon after the beginning of his examination by the OPA representative, is not determinative *ipso facto* of his claim of immunity for the offenses

of which he stands convicted. His claim falls because he is unable to show that thereafter he testified, under compulsion, to incriminating facts which bore a substantial relation to those offenses. *Heike* v. *United States*, 227 U. S. 131.

1. Petitioner was charged, in substance, with the procurement of materials by the unlawful use of priorities and the sale of those materials at overceiling prices. His testimony before the OPA examiner that he was the sole stockholder, officer and director of Daisart, which was engaged in the business of manufacturing, purchasing and selling textiles, was innocuous. Similarly, his testimony that Daisart was a contractor for manufacturers of wearing apparel who owned the materials which Daisart made into finished garments, had no connection with the charges that Daisart itself unlawfully used priorities to *purchase* materials and then diverted such materials to the black market. Petitioner disclosed the names of three of the suppliers from whom Daisart purchased materials and under the decision below he has obtained immunity for all the offenses which involved transactions with those firms. The additional comment in his testimony that there were "several others but I cannot remember them" was not substantially related to the charges against him and was, in any event, unresponsive to the examiner's question, which presupposed the existence of other suppliers. The testimony that

materials were paid for by checks drawn on an account in a designated bank likewise bore no substantial relation to the offenses.

2. The only part of petitioner's testimony which tended to incriminate him in respect of the offenses of which he stands convicted consisted of his disclosures that Metals Disintegrating Company had furnished Daisart with priorities to enable the latter to procure materials with which to fill the orders of Metals; that Daisart had applied and extended those priorities in purchasing materials; and that surplus materials were sold. This part of his testimony was unresponsive to the question of the examiner and petitioner admitted that it was a voluntary statement for which he did not claim immunity. It is well established that a witness may waive immunity by a volunteered statement. The Court of Appeals was unanimously of the opinion that petitioner meant to volunteer this information and that it was so accepted by the OPA examiner. Consequently, immunity did not result from that part of his testimony.

3. The part of petitioner's earlier testimony in which he stated that surplus materials had been sold at cost plus transportation charges was implicity incorporated in his subsequent voluntary statement, and, therefore, was embraced within his waiver of immunity. In any event, it was self-exonerating testimony, showing that sales prices were lower than the OPA ceilings. Im-

munity does not result from testimony of a non-incriminating character, for, in the absence of an immunity statute, a witness is not entitled, under his constitutional privilege, to withhold such testimony. And a claim of immunity can be no broader than the constitutional privilege.

ARGUMENT

Introduction: The scope of the immunity statute

Petitioner's position is that he was compelled to make disclosures to an OPA official in response to a subpoena and hence should have been granted immunity for the offenses of which he stands convicted. His claim of immunity is predicated on the provisions of § 202 (g) of the Emergency Price Control Act of 1942, 50 U. S. C. App. 922 (g) (*supra*, pp. 2–3), to the effect that no person shall be excused from complying with any requirements to testify and produce documents under the act "because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893, * * * [*supra*, pp. 3–5] shall apply with respect to any individual who specifically claims such privilege." The Compulsory Testimony Act provides: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commis-

sion, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding," except for perjury committed in so testifying.

It is apparent that petitioner appeared before an OPA examiner pursuant to subpoena, made a claim of "privilege as to anything that I say" (R. 1011) and that his testimony "concerned," in some degree at least, "the transaction, matter or thing" for which he was subsequently prosecuted. Upon a literal construction of the statute, therefore, his claim to immunity would appear to have some color. But such a literal construction has been rejected by this Court and is manifestly contrary to authority, reason and policy. As the Court recently concluded in *Shapiro* v. *United States*, 335 U. S. 1, 19, Congress "intended the immunity proviso in the Price Control Act to be coterminous with what would otherwise have been the constitutional privilege of petitioner in the case at bar." For that reason, "the immunity provisions of the Compulsory Testimony act can be relied upon here only if the two prerequisites set forth in § 202 (g) are satisfied: (1) that the person seeking to avail himself of the immunity could actually have been excused, in the absence of this section, from complying with any of its requirements because of his constitutional privilege against self-incrimination, and (2) that the person specifically claim such privilege." *Id.* pp. 21–22.

Petitioner accepts the premise that the immunity accorded by § 202 (g) is "in all respects commensurate with the protection guaranteed by the constitutional limitation" (Br. 15). The term "commensurate" connotes, of course, that the statutory immunity is as broad, *but no broader,* than the constitutional privilege. Petitioner must show, therefore, that he was compelled, over a specific claim of privilege, to make testimonial disclosures which, in the absence of the immunity statute, he had the right to refrain from making because of his constitutional privilege.

The claim of "privilege as to anything that I say" which petitioner interposed soon after the commencement of his interrogation was apparently accepted by the OPA official (R. 1011). It could mean at most, however, that, in lieu of expressly repeated assertions of the claim of privilege against self-incrimination before each answer, it was understood by both parties that the claim would apply, for all that it was worth, as if it had been made before each answer. Clearly, however, the blanket claim of privilege was not *ipso facto* determinative of the award of immunity. Petitioner concedes as much: "We do not mean to assert that any innocuous testimony given by a witness, such as the giving of one's name or residence, would invade his legal rights against self-incrimination. The evidence obviously must be of

a more substantial nature which would go to the substance of the prosecution itself." (Br. 17.) Obviously, also, the evidence must have been *compelled*. That is, it must have been called for by the question. Otherwise, a witness could use the immunity statute as a trap by volunteering, unresponsively to any question, disclosures of criminal connections and thereby purge himself of those crimes. Moreover, it must be at least inferentially clear that his general claim of privilege was not retracted in the course of the examination, i. e., that he continued to claim the privilege for each answer. Since the privilege was personal to the witness, he could, of course, have waived it at any time. Thus, we must examine each answer which is now urged as a basis for immunity and determine (1) whether it was, in fact, compelled over a claim of privilege, and (2) whether it was substantially related to the offenses of which petitioner stands convicted.

Petitioner does not deny that these limitations govern claims of immunity. He contends in effect that they were satisfied in this case. We maintain that the only part of his testimony which substantially related to the offenses of which he stands convicted was that part which concerned the procurement of materials by means of priorities and the sale of such materials. And we maintain further that petitioner volunteered that part of his testimony and expressly waived as to it any

claim of immunity. The Court of Appeals so held. The dissenting judge was of the opinion that although the waiver applied to the counts of the informations of which he stands convicted, involving illegal use of priorities, it did not extend to the charge of the indictment of conspiracy to violate the Emergency Price Control Act. In his opinion, that part of petitioner's voluntary statement in which he said that he sold surplus materials did not embrace petitioner's prior testimony that he sold such materials at prices consistent with formulae prescribed by applicable OPA regulations. But, as we shall show under Point III, this latter testimony was self-exonerating, and immunity does not result from such testimony.

I

The only part of petitioner's testimony which bore a substantial relation to the offenses of which he stands convicted was that which concerned the procurement of materials by means of priorities and the sale of such materials

Although it is not entirely clear which part of his testimony petitioner relies upon in support of his claim of immunity, as we read his brief, he appears to include the following, but rests primarily on the first two items, (a) and (b):

(a) Daisart was a contractor for Metals Disintegrating Company, which had a prime contract with the Government to manufacture ammunition bags; Metals furnished Daisart with suitable pri-

Accordingly, the counts of the informations of which petitioner now stands convicted, and which related to the abuse of priorities, were unanimously sustained against the claim of immunity.

In respect of the charge in the indictment of conspiracy to violate the Emergency Price Control Act and the OPA regulations, the majority also concluded that petitioner's voluntary statement that he had sold surplus materials procured on priorities and that such sales formed a good part of Daisart's sales (par. (a), *supra*, pp. 22–23), was sufficiently comprehensive in scope to include within his waiver his prior statement that the surplus had been sold "at the price billed to me plus freight and haulage and less discount allowed to me" (par. (b), *supra*, p. 23). Thus, the majority of the court held that petitioner also had waived immunity in respect of the charge of the indictment. The dissenting judge, on the other hand, was of the opinion that the volunteered statement did not encompass any disclosure concerning the price at which the surplus material had been sold but only that it had been sold.

We think the majority of the court correctly interpreted the scope of petitioner's voluntary statement. He had first testified that surplus materials were sold at net cost plus transportation charges, which was obviously lower than the OPA ceiling price (R. 350). Subsequently, in the statement for which he disclaimed immunity, he disclosed that the surplus material which had been

procured by means of priorities had been sold. In view of his prior statement, he obviously meant that such surplus had been sold "at the price billed to me plus freight and haulage and less discount allowed to me." As the Court of Appeals observed (R. 1046): "The whole tenor of his volunteered statement is that he was making perfectly valid sales, just as he had previously explained; the fact that he does not here repeat the OPA formula (which was of course no news or no new lead to the examiner) should not now procure him an immunity which, as it seems clear to us, he did not intend at the time to claim."

In any event, however, petitioner's claim of immunity on the charge of the indictment falls for still another reason. The disclosure that the surplus was sold at or below the maximum price prescribed by the OPA regulation was an exculpatory statement and, for that reason, as we shall show under Point III, it does not support petitioner's claim of immunity.

III

Petitioner's testimony concerning the prices at which he sold materials was self-exonerating. Immunity does not result from such testimony

Petitioner cites no authority other than Judge Hand's dissenting opinion for his contention that he was entitled to immunity on the charge of the indictment, despite the fact that the only testimony he gave substantially relating to that offense

showed compliance with the OPA ceiling prices (R. 350) and, therefore, was a representation of complete innocence (Br. 23–24). He disregards the premise expressly laid down by this Court in the *Shapiro* case, 335 U. S. 1, that the immunity granted by section 202 (g) of the Emergency Price Control Act was merely an *exchange* for the constitutional privilege against self-incrimination. And since we shall show—what seems almost self-evident—that in the absence of an immunity statute petitioner would have been excused under his constitutional privilege only from supplying *incriminating* testimony, his claim of immunity on the charge of the indictment has no merit.

Judge Hand stated that "the privilege [the statutory immunity?], if it is to exist at all, must include all questions which are relevant to the witness's guilt, regardless of how he will answer them" (R. 1048). Similar reasoning was employed by Judge Humphrey in *United States* v. *Armour*, 142 Fed. 808, 822 (N. D. Ill.):

> Now, in my judgment, the immunity law is broader than the privilege given by the fifth amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the

> matter covered by the indictment, and the evidence need not be self-incriminating. * * *

But Judge Humphrey's views as to the scope of an immunity statute in relation to the privilege were implicitly repudiated by this Court in *Heike* v. *United States*, 227 U. S. 131, and in *Shapiro* v. *United States*, *supra*.

The Fifth Amendment protects a person from being compelled to be a witness against himself. "It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate personal documents or effects that might incriminate him." *United States* v. *White*, 322 U. S. 694, 698. It is difficult to perceive how petitioner was compelled to be a witness *against* himself when indeed he falsely exonerated himself. "The prohibition against his being compelled to testify against himself presupposes a legal detriment to the witness arising from the exposure." *Brown* v. *Walker*, 161 U. S. 591, 600. As Professor Wigmore noted: "The privilege, by hypothesis, would have been violated only if the witness had truly confessed his crime, but if he denies it and falsely exonerates himself, he has confessed no fact 'against himself'." 8 Wigmore, *Evidence* (3d ed. 1940) § 2282, p. 504.

In claiming the constitutional privilege, a witness necessarily asserts his belief that the testi-

other firms from which he purchased textiles. The tenuous argument runs in this fashion: True, petitioner disclaimed any recollection of the names of the firms (a remarkable lapse of memory considering the fact that his transactions with these firms within the previous year had comprised millions of yards of textiles (see, e. g. R. 141, 241, 248, 300) and in the case of one company had cost petitioner more than $269,000 (R. 139)); nevertheless he had informed the examiner that there were other suppliers; this information, coupled with the disclosure that Daisart had an account at a particular bank, enabled the Government "to trace the companies which were the unnamed suppliers of the petitioner. In this manner the Government was able to set out the various counts in each of the two informations and ultimately obtain his conviction thereon." (Br. 9.)

Certainly, the revelation that the corporation had an account in a specified bank—information which normally appears in resolutions contained in corporate minute books—was perfectly innocent. In effect, petitioner is contending that if he had not told the Government investigators that there were other suppliers, they would have accepted his testimony that the three named firms were the exclusive suppliers of materials and would not have thought of looking at the bank records. He overestimates their credulity. To put it another way:

If petitioner were not already suspect, the information that there were "other suppliers" would have been insignificant and would have passed unnoticed; and if he were already suspect, such information would have been meaningless since it would have cast no light on his criminal connections. Knowledge that petitioner had purchased material from several suppliers was obvious from the nature of his business and provided no new lead to the discovery of his offenses. It may be noted also that the examiner's question presupposed the existence of suppliers of material and inquired merely whether petitioner could furnish their names. His answer was no more in substance than the familiar, "I don't remember." Surely petitioner is not entitled to be rewarded for his convenient lapse of memory.

We are thus brought to a consideration of the testimony summarized in paragraphs (a) and (b) above, upon which petitioner primarily relies for his claim of immunity. There can be no question that these disclosures "concerned" in a substantial way the charges on which petitioner was later prosecuted. That is what we meant by the concession in our brief in opposition to the petition for certiorari, in which we stated (p. 10): "Petitioner Smith concededly gave testimony before the OPA official which substantially related to the transactions which were the subject of the indictment and the informations." We did not

concede, as petitioner implies we did (Br. 21), that *all* the matters and things about which he testified were directly connected with the offenses of which he stands convicted. Quite the contrary. The part does not include the whole.

II

Petitioner's statements concerning his procurement of materials by means of priorities and the sale of such materials were voluntary and he expressly waived any claim of immunity in respect of those matters

In the absence of the immunity provisions of § 202 (g), petitioner would have been entitled to remain silent only to the extent permitted by the constitutional privilege. Clearly, however, he could have volunteered information and thereby waived the privilege. *Raffel* v. *United States*, 271 U. S. 494. Nothing in the immunity statute prevents a witness from similarly volunteering information. In *United States* v. *Monia*, 317 U. S. 424, this Court held that in respect of an immunity statute which did not require a specific assertion of the privilege, testimony was not voluntary merely because a witness did not claim the privilege after appearing before a grand jury in obedience to a subpoena. The *Monia* decision does not mean, of course, that under an immunity statute a witness cannot volunteer information and thus waive any claim of immunity. Under the type of immunity statute there involved, an *affirmative* surrender of the privilege

is required before a witness can be said to have waived immunity. Failure to claim the privilege is not enough to constitute a waiver. But under § 202 (g), the witness must specifically claim the privilege if he is to obtain immunity. This shift in emphasis does not mean that the witness gains immunity for volunteered information. There is no reason why he cannot waive the claim of privilege in part or in whole; or having claimed it at the outset for all his testimony, why he may not subsequently retract it or modify it. When he gives answers which are not responsive to questions such answers cannot be said to be "compelled," particularly where, as here, the witness is intelligent and advice of counsel is readily available. To the extent that he goes beyond the requirements of the question, he has himself retracted to that extent his claim of privilege.

Petitioner seems to rest upon the blanket claim of privilege which he asserted at the outset of the interrogation. But that is only the starting point of consideration of our problem, not the finish. The blanket claim of privilege placed petitioner in a position to assert immunity if, but only if, he thereafter had furnished incriminating testimony which was responsive to the questions of the examiner. The scope of immunity is limited by the questions asked, and is therefore within the control of the examiner. Such control must rest with the examiner, or he will not dare ask any

questions of a witness asserting the privilege—thereby completely defeating the purpose of the immunity statutes. Certainly, if, after the general claim of privilege, the official had asked petitioner only his name and address, petitioner would not thereby have acquired immunity. It is, therefore, misleading to say, as petitioner does (Br. 13), that if the examiner did not wish to exchange immunity for testimony "he should have stopped further inquiry." It is also a significant overstatement to argue (Br. 6) that petitioner advised the OPA representative that "he was claiming his right of immunity under the relevant Statute, and that such claim of amnesty would apply to all questions thereafter put to him on such examination and the answers made by him in response thereto." All petitioner could claim as a witness was a privilege against self-incrimination; immunity was obtained only if his testimony complied with the conditions, express and implied, in § 202 (g), as this Court noted in the *Shapiro* case.

Coming, then, to the particular disclosure that petitioner had purchased materials by the use of priorities which had been furnished to him in a blanket sum by Metals Disintegrating Company to enable him to fill their orders and that he disposed of such materials as were surplus for that purpose (par. (a), *supra*, pp. 22–23), it is clear that the immediate question which evoked his statement could have been answered by a simple "Yes" or "No."

Instead, he volunteered a detailed recital of his method of operation in his deals with Metals and introduced (for the first time in his entire testimony) a reference to priorities. The examiner immediately said, "This is a voluntary statement. You do not claim immunity with respect to that statement?", to which petitioner forthrightly replied, "No." (R. 1026–1027.)

Petitioner begs the question in stating that the examiner's comment was made "while the above answer was still within the purview of petitioner's claim of privilege." (Br. 27.) As we have stressed, petitioner had a claim of privilege only as to answers that were "compelled." His blanket claim of privilege did not confer "amnesty" upon him for every criminal connection which he might voluntarily divulge.

Despite the undisputed fact that neither petitioner, who had shown himself to be alert to his rights, nor his counsel, who was by his side, attempted in any manner to qualify the answer "No," the specious argument is now advanced (Br. 27) that perhaps petitioner was merely contradicting the first part of the examiner's comment and was not admitting that the statement was voluntary. To the contrary, at the trial 18 months later, petitioner's counsel characterized the answer "No" as a disclaimer of immunity, in the following colloquy (R. 854):

> [The Court.] In response to a question which the witness George Smith was asked, as follows:

"This is a voluntary statement. You do not claim immunity with respect to that statement?"

And the answer purported to have been given by him is, "No." That one answer will be received in evidence as to the defendant George Smith.

Mr. HART. May I be heard on that, your Honor?

The COURT. Yes.

Mr. HART. Your Honor will note that previous to that particular question and answer the defendant George Smith did claim privilege as to any questions which thereafter might be asked of him. He further gave this answer: he was asked by the Examiner: Do you claim immunity with respect to that answer?" and his answer was: "No."

Now, while your Honor might have a basis for ruling that with respect to that answer he does not have immunity, he still has privilege, and it certainly cannot be received as evidence. He was not asked whether he waived privilege; he was asked whether he waived immunity.

The COURT. That was referred to as a voluntary statement.

Mr. HART. That is the statement of the Examiner.

The COURT. That was the statement of the Examiner and I will resolve that question in favor of the defendant George Smith, and I will exclude the entire statement as to the defendant George Smith,

> including that one answer. I will admit it, of course, as to the defendant Daisart Sportswear, Inc.

Furthermore this was not the first time in the course of the examination that petitioner had made unresponsive answers (R. 1013). He was in no wise intimidated by the examiner. He availed himself of the advice of counsel, as in the instance when he refused to disclose the name of the individual doing business as Daisart Manufacturing Co. "unless on advice of counsel" and the question was withdrawn when his counsel objected to it as beyond the "scope of the subpoena" (R. 1020). When he was asked the names of his customers, he replied, "I could name some, but I would rather not answer" (R. 1020). In view of his mental agility in evading and limiting answers, equivocation cannot now be attributed to his disclaimer of immunity.

It should be noted that eight months previously petitioner had disclosed to investigators of the War Production Board, the agency primarily concerned with abuses of the priority system, his dealings with Metals Disintegrating Company, his use of priorities in purchasing fabrics, and his sales (R. 383, 399). We suggest that he may well have thought that if such information was incriminating, the damage had already been done. Moreover, he may have considered that phase of his operations insignificant so far as the investigation *by the OPA* was concerned; hence, his readiness to

admit that the particular disclosures were voluntary. In this connection, also, we should appreciate the fact that petitioner declined to answer or professed no recollection of the really crucial transactions about which the examiner was inquiring. And since the books and records which petitioner was required to keep (*Shapiro* v. *United States, supra*) were conveniently "lost or misplaced" (R. 1013), the Government had to rely on outside sources of information.

Much is made by petitioner of the trial judge's exclusion, as against petitioner, of his testimony before the OPA. The colloquy between petitioner's counsel and the court on that point has been quoted above (pp. 31–33). Petitioner interprets this exclusion to mean that the trial judge found that there was no voluntary statement by petitioner (Pet. Br. 30). In any event, the only evidence before the trial court on this point was the transcript itself and the Court of Appeals had at least equal opportunity to appraise it and draw the necessary inferences. Indeed, it was in a better position to deliberate on the voluntariness of the statement than was the trial court, in view of petitioner's failure to claim immunity properly before trial by a motion to dismiss under Rule 12 (b) of the F. R. Crim. P. He first raised the claim during the course of the trial.

There was no disagreement in the Court of Appeals that paragraph (a) of petitioner's testimony

was in fact voluntary, and constituted, as far as it went, a waiver of immunity. Judge Clark stated that (R. 1043):

> While this account thus to a certain extent overlapped testimony previously given it was at once a clearer, more connected, and more succinct statement of Smith's and the Daisart method of operation than had previously been disclosed. It is well settled that the immunity extends only to *compelled* testimony and, indeed, we have applied the doctrine of waiver of immunity under circumstances where the intent of the witness was less clear than here. *United States* v. *DeLorenzo*, 2 Cir., 151 F. 2d 122. Even where this testimony repeated previous answers which would have been subject to the witness' initial general claim of immunity, we see no reason why a witness cannot qualify and limit his claim as the examination proceeds, just as he can make new claims as to issues he has not waived. The Government indeed contends that the waiver should be held to cover all the testimony extracted so as not to bar this prosecution in any way. We think, however, that this would go beyond the intent of the witness and clearly beyond what the examiner understood and acted upon at the time. A more reasonable approach is to apply the waiver to the extent and in accordance with the intent of the witness, as the examiner accepted it at the time.

mony will incriminate him. In Aaron Burr's trial, Chief Justice Marshall required the witness Willie to state on oath that his answer would tend to incriminate him. *United States* v. *Burr*, 25 Fed. Cas. 38, No. 14, 692e; *Mason* v. *United States*, 244 U. S. 362, 364. A witness is entitled to remain silent only if the court finds that some answer to a particular question *could* incriminate him and the witness asserts that the particular answer which he would give (which necessarily means *truthfully* give), *would* incriminate him. *Mason* v. *United States*, *supra*. Clearly, a witness is not excused from answering if his answer would tend merely to subject him to public disgrace (*Brown* v. *Walker*, *supra*, 598), expose him to civil liability (cf. *Vajtauer* v. *Comm'r. of Immigration*, 273 U. S. 103), or incriminate him under the laws of another jurisdiction (*United States* v. *Murdock*, 284 U. S. 141; cf. *Feldman* v. *United States*, 322 U. S. 487; *Jack* v. *Kansas*, 199 U. S. 372). *A fortiori* he is not excused if the answer would tend to exonerate him of any crime.

In the absence of a proper claim of privilege, petitioner was under a duty to disclose his transactions to the OPA investigator, who was properly conducting an administrative inquiry under the authority of the Emergency Price Control Act. As noted in the dissenting opinion in *United States* v. *Monia*, 317 U. S. 424, 432–433:

> Duty, not privilege, lies at the core of this problem—the duty to testify, and not the privilege that relieves of such duty. In the classic phrase of Lord Chancellor Hardwicke, "the public has a right to every man's evidence." The duty to give testimony was qualified at common law by the privilege against self-incrimination. And the Fifth Amendment has embodied this privilege in our fundamental law. But the privilege is a privilege to withhold answers and not a privilege to limit the range of public inquiry. The Constitution does not forbid the asking of criminative questions. It provides only that a witness cannot be compelled to answer such questions unless "a full substitute" for the constitutional privilege is given. *Counselman* v. *Hitchcock,* 142 U. S. 547, 586. The compulsion which the privilege entitles a witness to resist is the compulsion to answer questions which he *justifiably* claims would tend *to incriminate* him. [Italics supplied.]

Accordingly, if, in the absence of an immunity statute, petitioner had remained silent even though the evidence would not have incriminated him, such silence would have been in derogation of his duty. Immunity which is intended to be exchanged for the surrender of a privilege should not serve as a reward for fraudulent evasion of a duty.

Judge Hand expressed concern for the supposed dilemma of a witness who was required to testify

under section 202 (g): unless he is granted immunity from prosecution for his false and exculpatory statement, "the result would be to compel him, if he were in fact guilty, either to confess his guilt, or to add perjury to it" (R. 1048). But one horn of the dilemma is quite comfortable, for, if he confessed his guilt, he thereby obtained immunity from prosecution. The public disgrace which might ensue is of no more consequence under the immunity statute than it is under the constitutional privilege. That point was disposed of long ago with the decision in *Brown* v. *Walker*, 161 U. S. 591. And it is significant that in a dissenting opinion in that case, Mr. Justice Shiras expressed the same concern for the witness as Judge Hand does here (161 U. S. at 622):

> * * * If he declines to testify on the ground that his answer may incriminate himself, he is fined and imprisoned. If he submits to answer, he is liable to be indicted for perjury by either or both of the parties to the controversy. His position in this respect is not that of ordinary witnesses testifying under the compulsion of a subpoena. His case is that of a person who is exempted by the Constitution from testifying at all in the matter. He is told, by the act of Congress, that he must nevertheless testify, but that he shall be protected from any prosecution, penalty or forfeiture by reason of so testifying. But he is subjected to the hazard of a charge of perjury,

> whether such charge be rightfully or wrongfully made. It does not do to say that other witnesses may be so charged, because if the privilege of silence, under the constitutional immunity, had not been taken away, this witness would not have testified, and could not have been subjected to a charge of perjury.

But this view gives inadequate weight to the competing duty of disclosure which is imposed upon every person as an essential part of the administration of justice. Every witness who is involved in crime is faced with the necessity of making a choice when he is called upon to testify. The problem is not peculiar to the immunity statute. Even in its absence, if petitioner were summoned by a Government investigator he would face the problem whether (1) to confess an incriminating fact, (2) to commit perjury or (3) to claim his privilege and thereby risk the probability that the investigator would draw adverse inferences which would stimulate a search for incriminating evidence. The same problem is present in a jury trial. "We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence." *Raffel* v. *United States*, 271 U. S. 494, 499.

Petitioner points to the proviso in the Compulsory Testimony Act of February 11, 1893,

"That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying" and states that "the net effect of the quoted portion is that immunity is to be granted in any event" (Br. 24). But the ostensible and direct interpretation is merely that *perjury is punishable* in any event. It will not do to say that immunity is a *quid pro quo* for perjury. As Mr. Justice Holmes stated in the *Heike* case, 227 U. S. at 141, "This last proviso was added only from superfluous caution and throws no light on the construction [of the immunity statute]," citing *Glickstein* v. *United States*, 222 U. S. 139, 143, 144.

The very purpose of the immunity statute was to obtain *truthful* testimony. No public purpose is served by obtained false and misleading information. Cf. *Glickstein* v. *United States*, *supra*; *Edelstein* v. *United States*, 149 Fed. 636, 643–644 (C. A. 8), certiorari denied, 205 U. S. 543. Although the immunity provisions which were construed in those cases were more limited than § 202 (g), the rationale is no less pertinent. In the *Glickstein* case the Court said:

> * * * the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and

hence not to command the giving of testimony in the true sense of the word.

In *Carchidi* v. *State*, 187 Wis. 438, 442–444, which involved an immunity statute which was identical with the Compulsory Testimony Act of 1893, immunity was claimed for exculpatory testimony which was given before a grand jury in response to a subpoena. The claim was denied in an illuminating opinion from which we quote at length as a review of our position:

> We are unanimously of the opinion that the correct rule of construction to be given our immunity statutes finds expression in the concurring opinions of Mr. Justice Marshall and Mr. Justice Winslow in *State* v. *Murphy*, 128 Wis. 201, 107 N. W. 470. It is plain that these immunity statutes, to be found in many states as well as in the acts of Congress, originated because of the constitutional provision that no witness shall be compelled in any criminal case to be a witness against himself. These immunity statutes were enacted for the purpose of procuring evidence which was not available because of this constitutional provision. * * *
>
> * * * * *
>
> A dominant principle of statutory construction is that to ascertain the legislative intent we may look to the evil to be remedied and the evident purpose of the legislation. When we do that, taking into consideration the development of criminal

law in this country, the difficulties that the public have encountered in securing convictions in certain classes of cases, we have no doubt that these statutes were passed for the express purpose of placing at the disposal of public prosecutors evidence which the constitutional provision denied, and that in order to entitle a witness to the immunity granted by these statutes the evidence given by him must have been of a character which he was privileged to withhold under the constitutional provision. Testimony given by him which he is not privileged to withhold by reason of the constitutional provision does not entitle him to the immunity afforded by the statutes under consideration.

A consideration of the evidence given by the defendant before the grand jury discloses that he there testified to nothing that in any manner or in the remotest degree could tend to convict him of crime. Such testimony as he gave with reference to the transaction upon which his conviction in this case is based went to the establishment of his innocence rather than his guilt. He denied that he did or said anything tending to defraud or which could be considered as obtaining money under false pretenses, and in no view of the case should his plea in bar have been sustained. Our attention has been called to no authority in conflict with this conclusion except the case of *U. S.* v. *Armour & Co.*, 142 Fed. 808, referred to in Mr. Justice Dodge's opinion, expressing

views which this court deliberately refused to sanction, according to the note written by Mr. Justice Marshall, to be found at page 217.[3]

Petitioner seems to imply (Br. 18–19) that, although the testimony that he had complied with OPA ceilings was intrinsically exonerating in nature, it was nevertheless incriminating because it disclosed knowledge on his part of the limitations imposed by the OPA on the sale price of goods. But since all who engaged in businesses subject to OPA regulation were presumed to know the OPA ceilings, there is no substantial connection between testimony admitting knowledge of the applicable regulation and the offense of selling at an excessive price. Certainly, if petitioner had been asked a direct question whether he knew the formula for computing OPA maximum prices, an affirmative answer would not have gained him immunity.

In summary, we maintain that petitioner did not obtain immunity on the charge of conspiracy to violate the Emergency Price Control Act because either (a) his disclosure of the price at which he

[3] In *Stone* v. *State*, 96 Tex. Cr. 211, the defendant appeared before the grand jury and, like petitioner, falsely exonerated himself. He was denied immunity for "manifestly his testimony disclosed the truth of no facts upon which this prosecution was originated or upon which this conviction rests. It would seem to follow logically that he was not being tried and is not now being punished 'for acts disclosed by such testimony'."

had sold the textiles was embraced within the tenor of the volunteered statement, as the majority of the Court of Appeals held, or (b) in any event, it did not in any way tend to incriminate him.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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